

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 21**

Los Angeles, California

**TRANSMARINE NAVIGATION CORPORATION**

Employer

**and**

Case No. 21-RC-20663

**MARINE CLERKS ASSOCIATION, LOCAL 63  
OFFICE CLERICAL UNIT, INTERNATIONAL  
LONGSHORE AND WAREHOUSE UNION,  
AFL-CIO<sup>1</sup>**

Petitioner

**DECISION AND DIRECTION OF ELECTION**

**I. The Petition and Issues Presented**

The Petitioner seeks to represent all clerical employees, including, but not limited to, receptionists, documentation clerks, operations personnel, tanker specialists, accounting clerks, and boarding agents at the Employer's Long Beach, California facility and to exclude all other professional and confidential employees, including guards and supervisors, as defined in the Act. At hearing, the Petitioner clarified that it seeks to include the operations manager - dry bulk and operations manager - liquid bulk in the unit and to exclude the travel agency manager and travel agent from the unit. In addition, the Petitioner would proceed to an election in a unit larger than or different from the petitioned-for unit.

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<sup>1</sup> The Petitioner's name appears as amended at the hearing.

The Employer contends that the petitioned-for unit is inappropriate. First, the employer avers that the operations manager - dry bulk and operations manager - liquid bulk are supervisors within the meaning of Section 2(11) of the Act and, as such, should be excluded from the unit. Second, the Employer avers that the travel agency manager and travel agent share a sufficient community of interest with the petitioned-for unit and should be included in the unit.

Both parties stipulate that the following classifications should be included in any unit found appropriate: all operations agents, documentation clerks, senior tanker specialists, accounting clerks, and corporate accounts payable clerks. Both parties further stipulate that the following classifications should be excluded from any unit found appropriate: all other employees, corporate accountant as a confidential employee, president/CEO, general manager – administration, financial controller, manager – agency accounting, district managers, professional employees, confidential employees, guards, and supervisors as defined in the Act.

## **II. The Regional Director's Findings**

I have considered the evidence adduced during the hearing and the arguments advanced by both parties. For the reasons set forth below, I find that the operations manager - dry bulk and operations manager - liquid bulk are supervisors within the meaning of Section 2(11) of the Act and that the travel agency manager and travel agent share a sufficiently strong community of interest with the employees in the petitioned-for unit as to compel their inclusion in the unit I find appropriate in this case. Accordingly, I will direct an election in a unit consisting of approximately 13 employees.

To lend a context to my discussion of the issues, I will first provide an overview of the Employer's operations and supervisory structure. Then, I will discuss the evidence regarding supervisory status and community of interest and the reasoning that supports my findings.

### **III. Overview of Employer's Operations and Supervisory Structure**

The Employer provides steamship agency services. It has several district offices, but the focus of the present petition concerns only the Employer's 301 East Ocean Boulevard, Suites 570 and 590, Long Beach, California location.

Captain Peter Whittington is the President/CEO and oversees all operations. Ashley Smith, Jr. is the district manager for the Long Beach District Office and reports directly to Whittington.

Manuel Martinez is the operations manager - dry bulk and Daniel Wiktorowicz is the operations manager - liquid bulk. Both report directly to Smith, Jr. and oversee the five operations agents assigned to their respective type of cargo.

The corporate accounts payable clerk, travel agency manager, and travel agent report directly to the financial controller on a day-to-day basis, but they may also report to General Manager – Administration Michael Cress regarding leave requests.

Other employee classifications in the petitioned-for unit include documentation clerks, accounting clerks, and senior tanker specialist. Employees in these classifications, as well as Smith, Jr., Martinez, Wiktorowicz, the operations agents, the travel agency manager, and the travel agent, work out of Suite 570. Whittington, Cress, the corporate accounts payable clerk, and the financial controller work out of Suite 590.

### **IV. Status of the Operations Manager - Dry Bulk and Operations Manager - Liquid Bulk**

#### **A. Background**

Martinez and Wiktorowicz were named to their respective positions in a meeting with Smith on July 10, 2003. Both men were previously operations agents. The creation of the operations manager - dry bulk and operations manager - liquid bulk positions signaled a change in the Employer's

organizational structure. Prior to the creation of these positions, the responsibilities for liquid bulk and dry bulk were vested in one operations manager, Ronald Kelly.

On July 10, 2003, immediately after being named to their positions, Martinez and Wiktorowicz ordered business cards reflecting their new titles. Wiktorowicz placed his new business cards on his desk sometime before August 1, 2003. Little else happened in the way of completely effectuating the two new positions until August 8, 2003. On August 8, 2003, Smith presented the job description for operations manager – dry bulk to Martinez and, shortly thereafter, both signed the description. That same day, Smith distributed a written memorandum to all of the Long Beach District Office staff informing them of the change in organizational structure and the responsibilities involved with the new positions. The job description for operations manager – liquid bulk was presented to Wiktorowicz by Smith on August 11, 2003, and both men signed it on that date.

The record reflects specific reasoning as to why Martinez and Wiktorowicz did not fully assume their new positions or sign their new job descriptions on July 10, 2003. To begin with, Smith did not want to make the transition official or inform the other employees until he was able to speak with Kelly, the former operations manager, about the change and about Kelly's new position (senior tanker specialist). Kelly was on vacation until on or about July 22, 2003. Additionally, on July 10, 2003, Smith did not have access to the operations manager - dry bulk and operations manager - liquid bulk job descriptions. The Employer considers job descriptions, which are kept in Suite 590, to be complex legal documents. Thus, Smith is unable to issue a job description without receiving Whittington's authority. When Martinez and Wiktorowicz were first promoted to their new positions, Whittington was on vacation and remained out of the office until August 1, 2003. Besides issuing the job descriptions upon his return, Whittington also authorized wage increases for Martinez and Wiktorowicz

to correspond to the pay range for operations managers. Operations agents earn between \$35,000 and \$50,000 per year, while operations managers earn between \$50,000 and \$65,000 per year.

With the exception of the title, the job descriptions for the operations manager - dry bulk and operations manager - liquid bulk are identical. In the opening summary paragraph of descriptions, the Employer designates the positions as supervisory. Some of the “Essential Functions” listed in the descriptions include: (1) Interview and make recommendations on the hire of marine operations department personnel as necessary. Together with senior company management, set or recommend pay rates and hours of work for subordinate marine operations department employees; (2) Distribute and assign ships’ agency work to operations agents in keeping with individual employee skills, experience, and customer requirements; and (3) Evaluate operations agents’ efficiency, productivity and effectiveness in the performance of assigned duties and provide feedback on job performance.

## **B. Analysis**

The Employer asserts that Operations Manager - Dry Bulk Manuel Martinez and Operations Manager - Liquid Bulk Daniel Wiktorowicz are supervisors and should be excluded from the bargaining unit. The burden of proving supervisory status rests squarely on the party asserting that claim. *Bennett Industries*, 313 NLRB 1363 (1994). For the reasons set forth below, I find that the Employer has met its burden and that Martinez and Wiktorowicz should be excluded from the unit.

“Supervisor” is defined in Section 2(11) of the Act to mean any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires

the use independent judgment. An employee is a statutory supervisor if he or she has (1) the authority to engage in any of the supervisory functions, (2) his or her exercise of supervisory authority “is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) the authority is held in the interest of management. *NLRB v. Kentucky River Comm. Care, Inc.*, 532 U.S. 706, 713 (2001) (citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-74 (1994)).

The record reflects that since being named to their new positions on July 10, 2003, Martinez and Wiktorowicz have engaged in the assignment of vessels to operations agents. Martinez and Wiktorowicz undertake this task, on their own accord, based on their knowledge of an operations agent’s experience with a particular vessel as well as customer requirements. Martinez and Wiktorowicz have also reallocated the workload in order to perform more of their managerial duties in the office. Both men have taken part in training the operations agents and providing written evaluations of them.

In addition, the record reflects that Martinez and Wiktorowicz possess the authority to interview and effectively recommend hires, discipline, address and resolve employee grievances, grant time off, commit the Employer’s financial resources, and effectively recommend bonuses. Martinez and Wiktorowicz also share the responsibility of acting for the district manager in his absence and, as noted above, earn a higher salary (between \$50,000 and \$65,000 per year) than do the operations agents (between \$35,000 and \$50,000 per year).

The job descriptions for the operations manager, operations manager – dry bulk, and operations manager – liquid bulk are identical, notwithstanding the titles. When Kelly served as operations manager, in fact, the record reflects that he was involved in the vessel assignment process and also helped determine employee Christmas bonuses in 2002.

The Board has noted that the indicia of supervisory status contained in the statute are set

forth disjunctively, and if a person meets any of those indicia, he must be considered a supervisor. *Hydro Conduit Corp.*, 254 NLRB 433, 436 (1981). Here, Martinez and Wiktorowicz use independent discretion in the responsible direction of the employees through their assignment and reallocation of the workload. Further, the Board has often considered one's job description when evaluating the existence of supervisory indicia. *Pine Manor Nursing Home*, 270 NLRB 1008, 1009 (1984). The memo distributed to employees and the operations manager - dry bulk and operations manager - liquid bulk job descriptions indicate that Martinez and Wiktorowicz possess many of the other indicia of supervisory status present in the statute.

The Union cites *Capital Transit Co.* in furtherance of its argument that although supervisory authority may exist, the absence of exercise of that authority may negate its existence. 114 NLRB 617 (1955). *Capital* is distinguishable from the instant case. In *Capital*, the Board found that the classification in question did not possess any of the 2(11) indicia; here, not only do Martinez and Wiktorowicz possess many of the 2(11) indicia, but they have also exercised this authority. *id.* at 629.

Contrasting *Capital*, the Board, in *Fred Meyer Alaska, Inc.*, determined that a meat manager who possessed the authority to hire but had not exercised that authority to be a supervisor. 334 NLRB No. 94 (2001). As demonstrated by *Capital* and *Fred Meyer*, it is evident that supervisory determinations must be made on a case-by-case basis.

The facts of the instant case are similar to *Tesoro Petroleum Corporation*, where the Board found to be supervisory four newly-created shift supervisor positions with a broad written description of powers, despite the absence of a showing of exercise of those powers. 192 NLRB 354 (1971). Here, as in *Tesoro*, the persons placed into their new positions have had little time to exercise their authority.

Finally, the Union argues that the Employer attempted to make Martinez and



Wiktorowicz appear to be supervisors (and, thus, be excluded from the unit) in response to the Union filing its petition on August 8, 2003. However, this is an inappropriate forum for that contention to be raised. It is a well-settled policy that in representation proceedings, the Board will not permit the litigation of questions as to whether the Employer engaged in conduct constituting unfair labor practices. *National Foundry Company of New York, Inc.*, 109 NLRB 357 (1954).

## **V. Community of Interest: The Travel Agency Manager and Travel Agent**

### **A. Community of Interest Factors**

The Board first announced the community of interest test, which it uses in determining whether a bargaining unit is an appropriate one, in *Kalamazoo Paper Box Corporation*. 136 NLRB 134 (1962). “In determining whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration.” *The Boeing Company*, 337 NLRB No. 24 (2001) (citations omitted).

#### Wages and Benefits

The travel agency manager, travel agent, corporate accounts payable clerk, documentation clerks, and accounting clerks earn between \$25,000 and \$35,000 per year. The operations agents earn between \$35,000 and \$50,000 per year. The senior tanker specialist earns between \$50,000 and \$65,000 per year. All employees receive the same medical benefits, vision benefits, dental benefits, 401(k), short-term disability, long-term disability, and life insurance plans.

#### Hours of Work

The travel agency manager, travel agent, corporate accounts payable clerk,

documentation clerks, and accounting clerks work a nine-hour day, either from 8:00 a.m. to 5:00 p.m. or 9:00 a.m. to 6:00 p.m. If the operations agents are not attending a vessel, they too work a nine-hour day. If, however, the operations agents are attending a vessel, their working hours are sporadic and dictated by the needs of the vessel being serviced.

#### Other Working Conditions

All employees enter work through the same front entrance and share a common lunchroom, located in Suite 570. The travel agency manager, travel agent, senior tanker specialist, documentation clerks, accounting clerks, and operations agents work out of Suite 570. Within Suite 570, the senior tanker specialist, documentation clerks, accounting clerks, and operations agents work in a large room known as the “pit.” The travel agency manager and travel agent work in a separate office, but when either is present, the door between their office and the “pit” is always open. The corporate accounts payable clerk works out of Suite 590.

#### Commonality of Supervision

The financial controller supervises the travel agency manager, travel agent, and corporate accounts payable clerk. The operations manager - dry bulk and operations manager - liquid bulk supervise the operations agents.

#### Degree of Skill and Common Functions

The difference between the travel agency manager and travel agent positions is in title only. The person who holds the travel agency manager does so only because of seniority; both positions perform identical work and share common functions. The travel agency manager does not supervise the travel agent in any fashion. Although neither position requires any form of certification, an applicant

must have travel agency experience and meet the requirements of the International Association of Travel Agents.

### Frequency of Contact and Interchange

All employees who work out of Suite 570 contact each other daily. The travel agency manager and travel agent engage in both business and personal matters in the “pit,” where the senior tank specialist, operations agents, documentation clerks, and accounting clerks work, and engage in both business and personal matters. For example, operations agents must contact either the travel agency manager or travel agent to make travel and accommodation reservations for the crews aboard the vessels. Additionally, the senior tank specialist, operations agents, documentation clerks, and accounting clerks use the travel agency services to make personal travel arrangements. The common lunchroom also provides ample opportunity for frequent employee contact.

With regard to interchange, the travel agency manager and travel agent do not substitute for the operations agents or documentation clerks. The operations agents, documentation clerks, and accounting clerks do not substitute for each other, either.

### Functional Integration

As noted above, operations agents must contact either the travel agency manager or travel agent to make travel and accommodation reservations for the crews aboard the vessels. The operations agent first communicates his/her request, in person, to the travel agency manager or travel agent. The travel arrangements are then made, and the travel agency manager or travel agent hand delivers the itinerary or a printout of the arrangements to the requesting operations agent. The operations agent, in turn, takes the arrangements to the vessel and provides them to the crew.

### **B. Analysis**

The Employer asserts that the travel agency manager and travel agent share a sufficient community of interest with the senior tanker specialist, corporate accounts payable clerk,

operations agents, documentation clerks, and accounting clerks and should be included in an appropriate unit. The burden of proving that the petitioned-for unit is inappropriate lies with the party challenging the unit's appropriateness. *Livingstone College*, 290 NLRB 304, 305 (1988). For the reasons set forth below, I find that the Employer has met its burden and that the travel agency manager and travel agent should be included in the unit.

The Union advances four reasons in support of its position to exclude the travel agency manager and travel agent from the unit. First, the Union points to a lack of integration with the work functions. This argument ignores the important role that the travel agency manager and travel agent play in the Employer's overall operation by securing travel and accommodation reservations for the vessel crews. Second, although the Union states that supervision is distinct, the corporate accounts payable clerk, a classification that the Union stipulates should be included in any unit found appropriate, shares the same supervisor (financial controller) as both the travel agency manager and travel agent. Third, the Union highlights the fact that the travel agency manager and travel agent work in their own office apart from the senior tanker specialist, operations agents, documentation clerks, and accounting clerks. A broader view reveals that all of the above-mentioned employees work in Suite 570 and that access is open and easy between the two work areas. Fourth, the Union contrasts the operations agents non-traditional work hours with the 9:00 a.m. to 6 p.m. schedule that the travel agency manager and travel agent enjoy. On the other hand, although some of the classifications may work from 8:00 a.m. to 5:00 p.m., the corporate accounts payable clerk, documentation clerks, and accounting clerks work hours that closely resemble those of the travel agency manager and travel agent.

In sum, the Union overstates the employee differences and loses sight of their similarities. In view of the pertinent Board law and the evidence reflected in the record of the similar wages and benefits, hours of work, supervision, frequency of contact, functional

integration, and other working conditions, I find that the travel agency manager and travel agent share a sufficient community of interest with the senior tanker specialist, corporate accounts payable clerk, operations agents, documentation clerks, and accounting clerks. Therefore, I will include them in the unit.

## **VI. CONCLUSIONS AND FINDINGS**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulated, and I find, that the Employer, a Delaware corporation, is engaged in the business of providing steamship agency services and has a place of business in Long Beach, California. During the past twelve months, the Employer provided services in excess of \$50,000 directly to customers located outside the State of California. Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. The parties stipulated to the Petitioner's status as a labor organization.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:



**INCLUDED:** All operations agents, documentation clerks, senior tanker specialists, accounting clerks, corporate accounts payable clerks, travel agency managers, and travel agents employed by the Employer at its facility located at 301 East Ocean Boulevard, Suites 570 and 590, Long Beach, California.

**EXCLUDED:** All other employees, corporate accountant as a confidential employee, president/CEO, general manager – administration, financial controller, manager – agency accounting, district managers, operations manager – dry bulk, operations manager – liquid bulk, professional employees, confidential employees, guards, and supervisors as defined in the Act.

## **VII. DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Marine Clerks Association, Local 63 Office Clerical Unit, International Longshore and Warehouse Union, AFL-CIO.

The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

#### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, the Regional Director of Region 21 will make it available to all parties to the election. To be timely filed, the list must be received in the Regional Office, 888 South Figueroa Street, 9<sup>th</sup> Floor, Los Angeles, California 90017, on or before September 24, 2003. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 213-894-2778. Since the list will be made available to all parties to the election, please furnish a total

of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **VIII. RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST, on October 1, 2003. The request may not be filed by facsimile.

**Dated** September 17, 2003, at Fort Worth, Texas.

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/s/ *Ralph Gomez*

Ralph Gomez, Acting Regional Director  
NLRB Region 21<sup>2</sup>

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<sup>2</sup> This case was transferred pursuant to the interregional assistance program for decision writing only.

**Classification Index**

177-8500

177-8520

401-1200

420-2900